IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr.Appeal No .111 of 2005
Reserved on : 05.10.2007
Decided on : 12.10.2007

Sanju Appellant

Versus

State of H.P. **Respondent**

Coram:

The Hon'ble Mr.Justice Surjit Singh.J.

The Hon'ble Mr.Justice Surinder Singh.J.

Whether approved for reporting ?[1] *yes.*

For the appellant : Shri Chandarnarayan Singh, Advocate.

For the Respondent Shri Som Dutt Vasudeva, Addl. A. G.

Per Surinder Singh, J.

Sanju, appellant herein has called in question, the judgment of conviction and sentence, passed under Sections 302 and 342 of the Indian Penal Code, by the learned Sessions Judge, Chamba in Sessions Case No.58 of 2003 decided on 17.2.2005 for allegedly causing the death of his wife Anjali Devi by dousing her in kerosene oil and setting her on fire

The trial court found the appellant guilty of the aforesaid offences and sentenced him as follows:

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ? yes***

Under section **302 I.P.C.**	*Rigorous imprisonment for life and to pay a fine of Rs.5,000/-. In default of payment of fine, to undergo simple imprisonment for a further period of six months; and*
Under section **342 I.P.C.**	*Simple imprisonment for six months and to pay a fine of Rs.500/-. In default of payment of fine, to undergo simple imprisonment for a further period of one month.*

The factual matrix of the case is that the appellant herein was married to Anjali Devi (deceased), both were Nepalese, were residing in a hut in village Udan in remote Pangi Tehsil of Chamba District. They were working as labourers with a contractor named Sanjay Kumar. It is alleged that the appellant used to treat Anjali Devi with cruelty. Prosecution case further goes on like this that on 26.8.2003 at about 8.30 p.m. the appellant was drunk, he doused Anjali Devi with kerosene oil and set her ablaze. Thereafter, he bolted the door from outside and fled away. Ajay Kumar (PW) another labourer was residing in the vicinity of the deceased. He was attracted by the cries of Anjali Devi, went to her hut, un-bolted the door went inside and found Anjali Devi

with burn injuries. The fire was already put off. On being asked she held the respondent responsible for the said act.

Thereafter, Ajay Kumar (PW) changed her clothes and took her to C.H.C.Killar for medical treatment where she was admitted. The Medical Officer examined the victim and found first and second degree burn injuries on her body which are mentioned in the M.L.C.Ex.PW-6/E. The Doctor informed the police. This information was recorded by the police, in the Daily Diary Rapat No.3, (Ex.PW7/A) dated 27.8.2003.

On reaching the hospital the Investigating Officer moved an application (Ex.PW-2/A) to the Medical Officer (Incharge), whether the victim was fit to make her statement. Doctor attending the victim, opined that the victim was fit to make the statement. Thereafter, vide EX.PW-2/D, statement of the victim was recorded and she put her thumb impression on the same in the presence of the Doctor Kalyan Thakur (PW). On this statement, F.I.R. Ex.PW-9/A was formally recorded wherein she is alleged to have stated that her husband poured the kerosene oil and set her on fire.

Police also obtained bed head ticket of Anjali Devi, maintained in the hospital. Her burnt clothes Ex.P-1 and P-2 were also taken into possession along with plastic Jerry can Ex.P-3 found lying in the hut containing 2 liters of kerosene oil. One match box

along with burnt match sticks were also taken into possession vide memo Ex.PW-5/B. Site plan Ex.PW-7/B was prepared.

The appellant was arrested on 27.8.2003 and was medically examined by the police. He was also found having burn injuries of Ist and 2nd grade on his hand as pointed out in schematic diagram and find mentioned in his M.L.C.Ex.PW6/B.

Anjali Devi remained admitted in the hospital till 9.9.2003 and thereafter she was discharged. Her parents took her for further treatment to Kangra but she died on 2.10.2003.

Police was informed vide memo Ex.PW-10/A. Her post-mortem was conducted in R.P.Collge & Hospital, Tanda (Kangra). In the opinion of the Doctor she had died on account of the combined effect of asphyxia, anemia, general debility, septi cemia, toxemia and fibrosis of the lungs due to the ante-mortem superficial 58% ± 5% burns.

After completing the investigation, a challan was presented in the court for trial. The appellant pleaded not guilty and claimed trial to the charges put to him.

The prosecution examined the trial witnesses to prove the charges and put reliance on the dying declaration Ex.PW2-D.

The learned trial court after appreciating the evidence on record and upon hearing the parties, acquitted the appellant under Section 498-A of the Indian Penal Code but convicted and sentenced under Sections 302 and 342 of the Indian Penal Code, as aforesaid.

Feeling aggrieved and dissatisfied by the impugned judgment of conviction and sentence, the appellant has filed the present Jail appeal. Being a poor person, he had requested for providing him an Advocate at the State expenses.

Vide order dated 29.3.2005 Ms.Seema Sood, Advocate, was appointed as Legal Aid Counsel. Since she remained absent, this court had appointed Mr Chandernarayana Singh, Advocate, to represent the appellant vide order dated 14.9.2007.

Learned counsel for the appellant raised many points to show that the impugned judgment is not legally and factually sustainable. He had also drawn our attention to the main pieces of evidence, relied upon by the prosecution and ventilated that if the evidence of the prosecution is appreciated in its right perspective, coupled with the fact that appellant has also sustained grievous burn injuries on his hands would show that he had no intention to commit the murder of his wife. He also pointed out the disclosure statement made to the Doctor at the time of his

medical, as indicated in his MLC Ex.PW6/B. The learned counsel also pointed out his conduct that the appellant was arrested from near the hospital, where the deceased was admitted, which goes to show that he had an intention to attend and save her. Thus it is ventilated that in these circumstances it is not a case for conviction under section 302 of the Indian Penal Code.

Contra Sh. Som Dutt Vasudeva, learned Additional Advocate General has vehementally argued that the dying declaration of the deceased inspires confidence which is corroborated by PW-3 Ajay Kumar. Learned Additional Advocate General, while relying upon reasoning given by the learned trial court, urged that no interference is called for in the judgment of conviction and sentence.

We have bestowed our best consideration to the points raised and have meticulously examined the evidence on record to find out the truth.

Therefore, first of all, we would like to discuss the statement of Ajay Kumar (PW), who reached the spot on hearing the cries of Anjali Devi (deceased). He was putting up in another hut at a distance of about 50 meters, from the hut of the deceased. After taking meals at about 8 p.m. he was taking rest, he heard the cries of Anjali Devi, when he went to her hut, found the door bolted from outside. On opening the door, he saw Anjali Devi was having burn

injuries on her body, the fire was already put off. She had disclosed to him that her husband (appellant) had poured kerosene oil on her body and thereafter put her on fire. He changed the clothes of Anjali Devi and thereafter took her to the hospital at Killar. According to him, police came on the following day on the spot and took into possession the burnt clothes of Anjali Devi *viz* Salwar Ex.P-1 and shirt (Kameez) Ex.P-2 and the same were sealed on the spot. One Jeri can (Ex.P-3) was also taken into possession along with match box Ex.P-4 and burnt sticks Ex.P-5. He has stated that about 8-9 persons had gathered on the spot but those were not interrogated by the police. He has further stated that the appellant-accused caught hold at a distance of half kilometer from the spot.

According to PW-2 Dr.Kalyan Thakur, when Anjali Devi was brought in the hospital with burn injuries on her body, he had informed the police and attended her. She was having Ist and IInd degree grievous burn injuries i.e. 45 to 50% and smell of kerosene oil was emitting from her clothes. The Doctor has shown the burn marks in the schematic diagram in the M.L.C.Ex.PW-2/C. She was referred to the Civil Hospital, Chamba, on the same day, but on the request of Sanju that she is a poor lady and her parents are also labourers and she be retained there for 3-4 days

in the hospital itself. Thus she was kept there for treatment.

As per endorsement on the Bed-Head Ticket Ex.PW-2/E she remained in the hospital till 8.9.2003 and thereafter referred to Zonal Hospital,Kullu. Treatment record also shows that she was given sedative drugs on 27.8.2003.

According to the Doctor Kalyan Thakur (PW2), the burns injuries were caused approximately within 12 hours.

The police moved an application to the Doctor, whether Anjali Devi was fit to make the statement. After examining Anjali Devi the Doctor observed that she was fit to make the statement. Then Investigating Officer, (PW-7) recorded the statement of Anjali Devi (Ex.PW-2/D) in the presence of Doctor Kalyan Thakur (PW2), which was read over and explained to Anjali Devi, who after admitting the contents thereof, affixed her thumb impression.

According to Doctor Kalyan Thakur (PW-2) when statement of Anjali Devi was recorded, he was busy in attending some other patient and he could not clearly say whether statement of Anjali Devi was recorded by the police, qua the cause of sustaining the injuries on her person. He further stated that though her statement was recorded by the police on 27.8.2003 and it was attested by him on the same day at 10 a.m.

In her dying declaration besides attributing the alleged act to her husband a new fact find mentioned that she had put off the fire by putting water on her self but while appreciating the testimony of PW-3 Ajay Kumar we have found that he did not say that the clothes of Anjali Devi were drenched with water. He was the best person to state this fact because he had removed and changed her clothes.

On the other hand, when the accused was arrested he was also medically examined on 27.8.2003 by Doctor Raj Kumar (PW6) at 12 noon. As stated above the appellant was also having Ist and IInd degree burn injuries on his hands and chin. The appellant had given history to the Doctor that "he was extinguishing the fire which was set on, by Anjali on herself after some family quarrel". Thereafter, the appellant also gave an history of having been beaten up by Babu and Prithi, Nepali labourers, who were working with the victim He was also suspected a fracture of his leg. The appellant was referred to x-ray but his x-ray report is not on record. Unfortunately, this defence was not put to the prosecution witness by his counsel. Though the Doctor has opined that the burn injuries on the hand and chin were possible in case one put the other on fire by pouring kerosene oil but this hypothecated explanation in the light of the fact that the appellant was arrested from near the hospital on the same day is

suggestive of a conduct that the appellant never wanted that his wife should die. It is also a fact that Anjali Devi had not died immediately though she was referred on 8.9.2003 to the Zonal Hospital Kullu but instead of her taking to that place for her further treatment she was brought back to the parental house owing to their poverty, where she died on 2.10.2003 i.e. after about 20 days. The Doctor had opined that she died on account of combined effect of asphyxia, anemia, general debility, septi cemia, toxemia and fibrosis of the lungs due to the ante-mortem superficial 58% ± 5% burns which means that the deceased was lean and thin, ill-fed lady. Due to burn injuries she faced acute dehydration and due to poverty she could not be taken to further better treatment to Zonal Hospital, Kullu and she remained without treatment for about 20 days. Had she been taken to bigger hospital in time the possibility of her surviving were bright.

Therefore, in the totality of circumstances while approaching her dying declaration with caution we have found that her dying declaration in the instant case in so far as putting off fire by her by pouring water is not dependable for the reasons that even the Investigating officer did not take note of the water inside the hut or utensils kept for keeping water, whether those were filled up with water or empty and even Ajay Kumar (PW) did not depose that he had noticed

that the victim had put off the fire by pouring water or that he clothes were wet as already discussed above. Since the appellant was also having Ist and IInd degree burns on his hands and chin is clearly indicative of the fact that he made efforts in extinguishing the fire. Therefore, on sifting the evidence and on the above circumstances it emanates that on some family feud the appellant must have doused her with kerosene oil and set her on fire,. Having the knowledge of the act that such act may cause death, but later realizing the end result of his act the appellant tried to put off the fire and sustained mixed Ist and IInd degree burns. When the fire was put off, he must have run away by bolting the door with fear of being beaten up but later arrested near the hospital where his wife was admitted.

Thus, in the given circumstances offence under section 302 of the Indian Penal Code is not made out, but on critical analysis we are of the view that the appellant had the knowledge of causing such burn injuries, as is likely to cause death, thus offence would be culpable homicide not amounting to murder. Therefore, the offence committed by the appellant would be under second part of Section 304 I.P.C. Accordingly, we partly allow the present appeal and alter the conviction from one under section 302 I.P.C. to that under Section 304 (second part) of the Indian Penal

Code and reduce the sentence to seven years rigorous imprisonment without disturbing the fine, whereas the sentence and fine imposed under section 342 IPC is maintained. The aforesaid sentences shall run concurrently and the appellant shall be given the benefit of section 428 Cr.P.C. Ordered accordingly.

For the reasons aforesaid, the appeal is partly allowed. The amended warrant be sent to the jail authorities.

Before parting with the matter we would like to record our appreciation to Shri Chandarnarayan Singh, Advocate, for the appellant, who rendered his valuable assistance to this Court.

The matter is accordingly disposed of.

(Surjit Singh),J.

October 12,2007 (Surinder Singh),J.
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